

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-7069

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BALLON, STOLL & ITZLER,

Plaintiff-Appellant,

-against-

THOMAS J. DUFFEY, HERMAN A. LUEKING, JR.,
ALBERT D. MATHESON, WILLIAM J. KENNEDY,
JOHN A. MURPHY, JACK A. SHEETZ, JOHN
SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT
HOLMES, DONALD PETERS, WILLIAM PRESSLER,
ODELL SMITH, ROY L. WILLIAMS, FRANK H.
RANNEY, and JOSEPH MORGAN, Not Individually
But as Trustees Under a Common Law Trust of the
Central States Southeast and Southwest Areas Pen-
sion Fund,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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(6336)

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ARGUMENT V.

GENERAL ORDER 44 HAS NO APPLICABILITY TO THE BSI- FUND CONTRACT

Although General Order 44 (GO 44) deals with the appointment of attorneys in Bankruptcy Court proceedings, the penalty provisions thereof have applicability only where compensation is sought which requires Court approval. The Fund chooses to ignore this not inconsequential requirement and, having digested part of GO 44, and disregarded the balance, urges that, inter alia, to compel it to comply with its contractual obligations would violate public policy. Compounding its mistaken reading of the literal language of GO 44, the Fund, cloaking itself with judicial robes, makes an unsupported and unwarranted finding of fact (BSI's misconduct) and urges only one issue: "What is the consequence of plaintiff's misconduct?" (Brief for Defendants-Appellees, p 38). The Fund's cavalier attitude, not unlike its blatant refusal to honor its contractual obligations, apparently proceeds upon some "divine right theory", molded, as necessary, to the facts. The Fund is, at best, mistaken, because:

(a) GO 44 has no applicability; and (b) in any event, BSI has performed no act which in any perversion of facts can be categorized as misconduct.

A. GO 44 is Inapplicable

No lengthy discussion is required to show that the penalty provisions of GO 44 have no applicability to the facts before the Court. Concededly, if BSI sought an allowance, or reimbursement of expenses, GO 44 would be applicable. However, BSI seeks to enforce a contract and GO 44 is absolutely inapplicable.

As the Fund predicates its reckless claim of misconduct on a violation of GO 44, which itself is inapplicable, no misconduct can exist.

In re Rogers-Pyatt Shellac Co., 51 F 2d 988 (2 Cir, 1931), cited by the Fund, is inapposite. The attorneys therein, unlike BSI, petitioned for an allowance for their services rendered for the receiver in bankruptcy. This Court, based upon GO 44 and then Rule 4 of the local bankruptcy rules, affirmed the denial of an allowance because the attorneys had failed to comply with both GO 44 and the applicable local rule. It is not difficult to clearly distinguish Rogers-Pyatt, supra, from the case sub judice this Court. The facts in Rogers-Pyatt, supra, are clearly distinguishable and the predicates for this Court's decision--GO 44 and then local rule 4--are not applicable. The Fund's reliance upon Rogers-Pyatt, supra, is misplaced. Likewise, the Fund's reliance upon GO 44 is misplaced.

ARGUMENT VI.

THE PENALTY FOR A VIOLATION OF
GENERAL ORDER 44 IS SPECIFICALLY
PROVIDED FOR THEREIN. IF THIS
COURT FINDS THAT THE BSI-FUND
CONTRACT VIOLATES GENERAL ORDER
44, THE APPROPRIATE SANCTION IS
THAT PROVIDED FOR IN THE GENERAL
ORDER AND THIS COURT SHOULD NOT
IMPOSE ADDITIONAL PENALTIES

The express terms of GO 44 make provision for the penalties to be imposed in the event of nondisclosure. Insofar as herein relevant, it is provided that

"[T]he court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both,***."

Since the Legislature has prescribed specific penalties for violation of GO 44, the agreement between BSI and the Fund, even if in violation of GO 44, should not be declared void because it was not the intent of the Legislature to make it void (John E. Rosasco Creameries, Inc. v Cohen, 276 NY 274 [1937]).

"If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. (citing treatises)."
John E. Rosasco Creameries, Inc. v Cohen, supra, p 278.

In Holmes v Nationwide Mutual Insurance Company, 40 Misc 2d 894, 244 NYS 2d 148 (Sup Ct, Broome Co, 1963), affd memo, 19 AD 2d 947, 245 NYS 2d 330 (2) (3rd Dept, 1963), the Court, subsequently citing Twin City Pipe Line Co. v Harding Glass Co., 283 US 353 (1931) and the Rosasco case, supra, noted (151 of 244 NYS 2d):

"Not every contract which violates a statute is for that reason unenforceable."

In Hayes v Magnus-Cutler, Inc., 41 Misc 2d 420, 245 NYS 2d 632 (Sup Ct, Nassau Co, 1963), plaintiff sought to recover the sum of \$4,000.00 loaned to defendant corporation. Defendant claimed that the loan was made solely to qualify plaintiff for old age benefits under the Federal Social Security Law and, argued defendant, constituted a fraud upon the Federal government which vitiated the entire agreement; which was thus against public policy; and which made unenforceable plaintiff's right to recover. The Court, awarding summary judgment to plaintiff, observed (633 of 245 NYS 2d):

"Parties are to be held to their contracts, freely and voluntarily entered into, unless it appears that public policy, as expressed in the statutes or court decisions, decrees their unenforceability (citing case). Yet, public

policy does not dictate that all contracts made in violation of law be unenforceable. A contract, although in violation of a statute, will not be declared invalid where it was not the intent of the legislature to make it void (citing Rosasco, supra). The legislature may impose other penalties than declaring such contract void, and the court will not affix an additional penalty not intended by the legislature (Furlong v. Johnston, 209 App. Div. 198, 204 N.Y.S. 710, affd. 239 N.Y. 141, 145 N.E. 910)."

If recovery was sought by BSI from the debtor, requiring Court approval, the penalty provision of GO 44, if a violation was found to exist, would apparently penalize BSI for the protection of other persons involved in the Neisco Arrangement because such other persons stand in a certain relation to the attorney for the bankrupt or the debtor-in-possession (cf., Wood v The Erie Railway Company, 72 NY 196 [1878]). However, since GO 44 does not expressly prohibit a contract such as that existing between BSI and the Fund, the contract is not necessarily void (Wood v The Erie Railway Company, supra).

The public policy of New York, as expressed in In re Exercycle Corporation (Maratta), 9 NY 2d 329, 335-336 (1961) would render void a contract which violates a Federal statute only if the "Federal statute forbade the performance

which was the subject" of the dispute. The Rosasco Court had earlier recognized what the Exercycle Court later enunciated when it permitted recovery irrespective of statutory violation, the Court indicating that such recovery would be permitted

"[i]f the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract,***" John E. Rosasco Creameries, Inc. v Cohen, supra, p 278.

Judge Haight recognized the New York concept of public policy set forth above (825 - 827a). This Court should not impose additional penalties which were not provided for by the Legislature and which would not be imposed by the courts of New York. If in fact BSI and the Fund violated GO 44, the resulting violation was malum prohibitum, not malum in se, and to deny BSI recovery would be to impose a harsh and unwarranted penalty. Contracts which violate statutory provisions and are merely malum prohibitum are not always void (John E. Rosasco Creameries, Inc. v Cohen, supra, p 278).

ARGUMENT VII.

THE BSI-FUND CONTRACT DOES NOT VIOLATE PUBLIC POLICY

The Fund would have this Court believe that its agreement with BSI was a "secret agreement" (Brief for Defendants-Appellees, p 36). Possibly, the Fund believes that if its agreement with BSI was "secret", it would violate GO 44 and public policy. However, as made clear in the addendum hereto (p 10), constant and repeated disclosures were made to all Neisco creditors and to the Bankruptcy Court that the Plan of Arrangement was to be funded by the Fund.

Irrespective of GO 44, the agreement does not violate public policy.

"The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. (citing cases). The meaning of the phrase 'public policy' is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests." Twin City Pipe Line Co. v Harding Glass Co., supra, pp 356-357 (emphasis added).

The United States Supreme Court has made clear that public policy is to be determined by reference to laws and legal precedents and not from general considerations of what the supposed public interests require (Muschany v United States, 324 US 49, 66 [1945]).

In order to justify invalidating the contract between BSI and the Fund,

"[T]here must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to [public] policy." Muschany v United States, supra, 66 of 324 US.

Judge Haight found that under New York concepts of public policy,

"contracts between private parties are rendered illegal by federal statutes only in a situation where 'public policy as embodied in a Federal statute forbade the performance which was the subject of dispute', (citing cases)." (emphasis by Court) (826a)*

Since GO 44 does not forbid performance of the BSI-Fund contract, public policy as embodied in GO 44 (or as absent therefrom) does not render the BSI-Fund contract illegal nor require that it be unenforceable.

*See pp 5-6, infra.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed and vacated and judgment should be directed in favor of BSI, as demanded in BSI's third cause of action, with costs in favor of BSI.

Respectfully submitted,

BALLON, STOLL & ITZLER
Attorneys for Plaintiff-Appellant

PHILIP SHERWOOD GREENHAUS
of Counsel

ADDENDUM

Constant and repeated disclosures were made to all creditors and to the Bankruptcy Referee, in open Court, that the Plan of Arrangement was to be funded by defendants (Neisco Court hearings, 2/24/70, pp. 97 & 99 [97,98e]; 3/24/70, pp. 105, 106; 4/9/70, pp. 124, 125 & 127; 4/16/70, p. 135 [partly reproduced, 99e]; 4/30/70, p. 145; 5/12/70, p. 151 [99, 100e]; 5/26/70, p. 4; 6/16/70, p. 160; 8/25/70, p. 196; 10/14/70, p. 349; 10/20/70, p. 17 [102, 103e]; 11/4/70, p. 32; 11/19/70, p. 77 [105, 106e]; 12/22/70, p. 87 [108e]; 10/5/71, p. 35 [124e]). Moreover, Fund attorneys were present at most times when such disclosures were made. The allegation of a "secret agreement" is nonsense.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JAMES LEVERICH, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 185 St. Marks Place
S.I., N.Y.

That on the 12 day of MAY, 1977,
deponent personally served the within REPLY BRIEF FOR
PLAINTIFF-APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

GREENBAUM WOLFF + ERNST
ATTORNEYS FOR DEFENDANTS-APPELLEES
437 MADISON AVE.
NEW YORK, N.Y.

Sworn to before me this

12 day of May, 1977
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

James Leverich